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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1666

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS TO REVIEW THE NON-FINAL JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS

Appearances for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS TO REVIEW THE NON-FINAL JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS

The petition of Paramount Film Distributing Corporation respectfully prays for the grant of a writ of certiorari to issue from the final judgment of the New York State Court of Claims to review the non-final judgment and the opinion of the Court of Appeals of the State of New York which directed further judicial action on its remand to the Court of Claims. Final judgment has been entered in the Court of Claims conforming to that direction.

Opinions Below

The majority and dissenting opinion of the Court of Appeals of the State of New York are reported at 30 NY 2d 415 and appear in the Appendix hereto as Exhibit A. The decision of the State of New York Court of Claims (Alpert, J.) directing entry of final judgment on remand is not reported and it is set forth in the Appendix to this petition as Exhibit B. The majority and dissenting opinions of the Appellate Division of the Supreme Court of the State of New York, on its review after trial, granting the judgment which was reversed by the Court of Appeals are reported at 37 AD 2d 226 and appear commencing at page 544 of the Record on Appeal before the State of New York Court of Appeals, submitted herewith. The decision of the Court of Claims in support of its original final judgment which was modified by the Appellate Division is unreported and appears at page 10 in the Record on Appeal. Reargument of this original decision was granted by the Court of Claims and on reargument a decision was entered adhering to the prior decision and opinion. This decision was not reported and it appears in the Record on Appeal at page 14.

A preliminary motion to dismiss the claim herein was denied in an unreported opinion by the Court of Claims (Record on Appeal, page 403) and this denial was affirmed with an opinion and dissenting opinion which are reported at 27 AD 2d 420 and appear in the Record on Appeal at pages 428 and 433.

Jurisdiction

The non-final judgment of the Court of Appeals of the State of New York (Appendix, Exhibit C) sought to be reviewed was entered on June 8, 1972. In August, 1972,

within the 90 days limited, petitioner served a motion in the Court of Appeals for reargument and to amend that court's remittitur. On September 28, 1972 the Court of Appeals denied the motion for reargument but entered an order (Appendix, Exhibit D) amending its remittitur by adding to it the following: "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the due process clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 NY 2d 415)."

The effect of the Court of Appeals' decision on the merits was to say that no recovery could be had of fees paid under an unconstitutional statute unless they were expressly paid under protest or that such payments were resisted by judicial action. The opinion and judgment interlocutorily determined only that there was no resistance by judicial action but that some fees had been paid under protest. No part of the claim was finally disposed of. Instead the whole matter was remanded to the Court of Claims with directions to determine the amount of fees paid under protest. Upon the return of claimant's motion to set the matter down for a hearing, counsel stipulated the amount of fees paid under protest and final judgment was entered, granting claimant a recovery of $341 plus interest and dismissing the claim in all other respects (Appendix, Exhibit E). Because of this stipulation, no further appeal in the State courts was available from the amount of the judgment.

Following entry of judgment in the Court of Appeals a non-final judgment for costs only was entered in the Court of Claims (Judgment entered June 16, 1972, Ap-

pendix, Exhibit F). Another judgment, ineffective for any other purpose and also non-final, was entered in the Court of Claims on October 27, 1972 amending the judgment entered June 16, 1972 to recite the addition to the Court of Appeals' remittitur (Appendix, Exhibit G).

Up to the time final judgment was entered in the Court of Claims on March 13, 1973, neither the judgment of the Court of Appeals nor any of the judgments of the Court of Claims (recited above) even purported to dispose of the claim in a final way (*California National Bank* v. *Stateler*, 171 U.S. 447; *Sand Springs Home* v. *Naharkey*, 299 U.S. 588; *Laclede Gas Light Co.* v. *Public Service Comm.*, 304 U.S. 398; *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62).

Final judgment was entered in the New York Court of Claims on March 13, 1973.

This Court's juridiction is invoked under 28 U.S.C. §1257 (3).

Questions Presented

1. Whether a State may, without denying due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States, retain fees charged under an unconstitutional motion picture licensing statute (New York Education Law; §§120-132) containing express criminal sanctions for failure to obey (Education Law, §§129-132), on the grounds (a) the void censorship system resorted to was somehow beneficial to petitioner; (b) no suit was brought to resist payment; and (c) the fees were not paid under formal protest where New York State law offered no single judicial or other action which would provide adequate remedy and payment of the fee under protest would endanger or delay the issuance of a

license and no refund could possibly have been made except after subsequent resort to an unreasonable multiplicity of suits.

2. Whether a State may, without denying due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States, require a film distributor, forced by threat of arrest and criminal prosecution to pay licensing fees under an invalid system of administrative pre-censorship, expressly to protest each fee payment and then bring a plenary action in the New York Supreme Court to declare the film licensing statute invalid while, at the same time, because of the six month statute of limitations for filing claims, file a claim in the New York Court of Claims for each small fee paid in the meantime.

3. Whether it is a denial of the equal protection and due process guaranteed by the Fourteenth Amendment of the Constitution of the United States for a State to refuse the refund of film licensing fee payments on the ground of voluntary payment, as a matter of law, by applying standards of law contrary to prior State decisions based on the State courts stated reasons that the fees were relatively small and that the grant of licenses, even by unconstitutional procedures of pre-censorship, were somehow beneficial to petitioner, a large film distributor.

Statement of the Case

Petitioner here filed a claim in the New York Court of Claims seeking refund of the motion picture license fees which it was required, if it would remain in business free from criminal prosecution, to pay under the New York Education Law (§§120-132) which statute had been subsequently declared unconstitutional. The Court of Claims awarded your petitioner $29,297 and on appeal to the

New York State Supreme Court, Appellate Division, Third Department, that award was increased to $128,322.50. The New York Court of Appeals (4-3) reversed that award and remanded the matter to the Court of Claims to determine the amount of fees paid under express protest with directions that it award judgment in that amount.

The effect of the reversal by the Court of Appeals, as found on remand by the Court of Claims, was to reduce the refund awarded from $128,322.50 to $341, protests having been filed only after the announcement of this Court's ruling in *Freedman* v. *Maryland* (380 U.S. 51) when the parties should no longer have been mutually mistaken as to the validity of the New York statute.

The majority opinion of the New York Court of Appeals established new prerequisites for negativing the defense of voluntary payment of fees which ignore the statutorily defined effect of mistake of law (New York Civil Practice Law and Rules, §3005; *Five Boro Electrical Contractors Association* v. *City of New York*, 12 NY 2d 146; *Mercury Machine Importing Corporation* v. *City of New York*, 3 NY 2d 418) and the business duress inherent in the statute (*Five Boro Electrical Contractors Association* v. *City of New York, supra; Swift & Company* v. *United States*, 111 U.S. 22) and as augmented by criminal sanctions for violators (New York Education Law, §§129, 131, 132). Voluntary payment was not found as a fact because the opposite was found in the trial court and in the Appellate Division and the New York Court of Appeals had no jurisdiction to disturb affirmed findings. Instead, it was imposed because, the majority of the New York Court of Appeals supposed, (1) Paramount Film Distributing Corporation was a large distributor with access to counsel; and (2) film licensing and pre-censorship, though the New York scheme therefor was unconstitutional, were for the public good and film distributors benefited from receiving licenses (*Paramount Film Distributing Corporation* v. *State*, 30 NY 2d 415, Appendix, Exhibit A).

REASONS FOR GRANTING THE WRIT

1. The requirement that payment be resisted by judicial action to negative the defense of voluntary payment denies petitioner equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In *Freedman* v. *Maryland* (380 U.S. 51) this Court declared constitutionally invalid a scheme for administrative motion picture pre-censorship under which exhibition of a film could be barred, on the censor's say-so alone, without judicial action, and in *Trans-Lux Distributing Corp.* v. *Board of Regents* (380 U.S. 259) this Court reversed a judgment of the New York Court of Appeals upholding the validity of the New York film censorship statute and remanded the cause to the New York State Court of Appeals for further proceedings. On remand the Court of Appeals directed judgment declaring the whole of New York's film licensing statute (Education Law, Part II, Article III, Title I) to be violative of the Fourteenth Amendment of the Constitution of the United States (*Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 16 NY 2d 710).

Paramount Film Distributing Corporation had for years complied with that statute and paid the fees exacted by the censor.

Under New York law no cause of action for refusal of the film licensing fees paid under the void statute accrued until one single, adequate remedy was available before a competent forum (*Homer Engineering Co. Inc.* v. *State of New York*, 12 NY 2d 508, 510-511). No single remedy was available to Paramount Film Distributing Corporation until the event of the authoritative striking down of the film licensing statute by this Court and Court of Appeals because in any permissible action in the New

York Supreme Court against the Board of Regents, no refund of the fees paid could be directed by money judgment or otherwise (*Matter of Psaty* v. *Duryea*, 306 NY 413; *Matter of Samuel Adler, Inc.* v. *Noyes*, 285 NY 34 and 625). On the other hand, in a suit on a claim for refund in the New York Court of Claims, that Court was without jurisdiction to declare the film licensing statute unconstitutional for lack of equity powers (*Matter of Psaty* v. *Duryea, supra*).

Against vigorous argument by the State that the claim should be dismissed for lateness, the Court of Appeals held, necessarily, that no cause of action accrued until the decision in *Matter of Trans-Lux Distributing Corp.* v. *Board of Regents* on June 10, 1965 (16 NY 2d 710) and that the present action was, therefore, timely commenced.

Nevertheless dismissal of practically the whole of the claim has been decreed by the Court of Appeals for failure to initiate a series of judicial actions not yet accrued and for failure to register protest. Both grounds deny Paramount Film Distributing Corporation due process and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States in that they deprive it, for impermissible reasons, of the same relief from mistake of law available to all other persons [New York Civil Practice Law and Rules, §3005 (formerly Civil Practice Act, §112-f); see *Five Boro Electrical Contractors Association, Inc.* v. *City of New York*, (12 NY 2d 146) in which involuntariness was based on mistake of law as to fees and *Mercury Machine Importing Corp.* v. *City of New York* (3 NY 2d 418) in which the mistake of law statute was held inapplicable to tax payments as distinguished from fee payments].

The rationale of the Court of Appeals majority opinion is that each of the fees was relatively small for such a large film distributor with a staff of lawyers, and, that

in spite of the unconstitutional, harrassing risk that any film might arbitrarily be denied a license, the successful acquisition of a license conferred some beneficence upon the licensee in any event, thereby reestablishing the validity of the licensing procedures stricken down by this Court and by the New York Court of Appeals as unconstitutional.

2. The requirement that payment be accompanied by protest to negative the defense of voluntary payment denies petitioner equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Similarly, with respect to protest, one under a mistaken apprehension as to the validity of a statute is uniquely deprived, *ex post facto*, absent any existing requirement of protest, of his right to rely on that mistake of law as accorded to all suitors by express enactment. More offensive to the requirements of due process is the arbitrary establishment, in this one case, of the prerequisite of affirmative but vain acts to establish involuntary payment of fees. Even if the Board of Regents agreed wholly with the basis of a fee payer's protest it had no power to refund the payment (*Matter of Samuel Adler, Inc.* v. *Noyes*, 285 NY 34), and the tacking on of a protest to the State prescribed form of application for a license (New York Education Law, §127) would invite delay or denial (*Swift Company* v. *United States*, 111 U.S. 22, 28-29). The illegal subjection of petitioner to void film licensing procedures under threat of arrest and prosecution was so intertwined with the fees charged for operating this unconstitutional censorship scheme that the decision sought to be reviewed, which preserves the validity of the statute insofar as it levied the fees, flaunts the intendment of the decisions of this Court in *Freedman* v. *Maryland (supra)* and *Trans-Lux Distributing Corporation* v. *Board of Regents (supra)*.

3. The barriers here erected to thwart the refund of fees collected under the void censorship statute have not been applied in other voluntary payment cases and are based on a theory of some residual validity of an unconstitutional statute deemed to be for the public good.

Involuntary payment, based on mistake of law alone, was approved in *Five Boro Electrical Contractors Association* v. *City of New York* (12 NY 2d 146, 147-150) and based upon legal duress was approved in *Peyser* v. *Mayor*, (70 NY 497, 498), *Strusburgh* v. *Mayor* (87 NY 452), *Mason* v. *Prendergast* (120 NY 536) and *Ardico Realty Corp.* v. *City of New York* (250 NY 29). The same rule has been applied by this Court (*Swift & Company* v. *United States*, 111 U.S. 22; *Stratton* v. *St. Louis S.W.R. Co.*, 284 U.S. 530).

In the present case, for the first time, in the face of lower court findings of utter business compulsion and the threat of criminal prosecution, unique additional prerequisites to recovery were established.

The law is clear that equal protection and due process of law are denied by the application of a statute of limitations without grant of a reasonable time for a claim to be presented after an adequate remedy and a forum become available (*Atchafalaya Co.* v. *Williams Co.*, 258 U.S. 190; *Wilson* v. *Iseminger*, 185 U.S. 55; *Hastings* v. *Byllesby & Co.*, 293 NY 413, 419; *Gilbert* v. *Ackerman*, 159 NY 118).

No less a limitation is the bar asserted against the present claim. As held in the present case, no cause of action for refund of fees accrued until June 10, 1965 when the New York Court of Appeals determined that the whole of the motion picture censorship and licensing statute was void (*Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 16 NY 2d 710). But, the claim of petitioner here was almost wholly dismissed for failure to commence

unspecified, non-accrued actions even though petitioner could not sue for want of an accrued cause of action in an effective forum. This bar is more of a denial of rights than the bar of time limitations.

Protest is not required by statute nor where duress or mistake of law is established. The imposition of a necessity for protest in a case where both duress and mistake of law are present as a matter of law wipes out all remedy for mistake of law and duress. A reading of the majority opinion shows clearly that this was done to preserve in part the semblance of some validity for a statute held impermissible by this Court under the Fourteenth Amendment of the Constitution of the United States in *Freedman* v. *Maryland* (*supra*) and *Trans-Lux Distributing Corp.* v. *Board of Regents* (*supra*) and held wholly void by the New York Court of Appeals (*Matter of Trans-Lux Distributing Corp.* v. *Board of Regents,* 16 NY 2d 710).

The decision below barring in the main the cause of action, before it accrued, denies petitioner equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

For these reasons a writ of certiorari should be issued to New York State Court of Claims to review the judgment and opinion of the State of New York Court of Appeals.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this day of June, 1973 three copies of the petition for Writ of Certiorari and the Appendix thereto were mailed, postage prepaid, to Honorable Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, New York, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX

EXHIBIT A

(Opinions of the New York State Court of Appeals)
(30 N Y 2d 415)

PARAMOUNT FILM DISTRIBUTING CORPORATION, RESPONDENT, v. STATE OF NEW YORK, Appellant. (Claim No. 45976.)

Decided June 8, 1972.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 2, 1971, which, *inter alia*, modified, on the law and the facts, and, as modified, affirmed a judgment in favor of claimant, entered upon a decision of the Court of Claims (HENRY W. LENGYEL, J.). The modification consisted of increasing the award.

Louis J. Lefkowitz, Attorney-General (Grace K. Banoff and *Ruth Kessler Toch* of counsel), for appellant.

John R. Davison and *Walter J. Josiah, Jr.* for respondent.

BREITEL, J. Claimant, a motion picture distributor, seeks recovery of $128,322.50 in motion picture license fees paid to the State from June 10, 1959 to June 10, 1965 when the applicable statutes were nullified (Education Law, § 120-132; *Matter of Trans-Lux Distr. Corp.* v. *Board of Regents*, 16 N Y 2d 710, on remand from the United States Supreme Court, 380 U. S. 259). The fee for original films was $3.50 for each 1,000 feet of film while the fees for copies was $3 plus an additional dollar for each 1,000 feet (Education Law, § 126). Although over a six-year period the fees aggregate an impressive sum, the

fee per motion picture distributed in New York was only an inconsiderable expense compared to the cost of production, most often less than $10. Claimant had paid all but a trivial portion of the fees without protest and had not otherwise ever resisted the statutory procedure for licensing or the payment of fees.

On the prior appeal, (14 N Y 2d 88) in the Trans-Lux case, (380 U. S. 259, 16 N Y 2d 710, *supra*) this court, in upholding the denial of a motion picture license, passed only on the propriety of denying a license for the particular motion picture in suit. The validity of the licensing statute, extant in some form since 1927, its procedure, and the fees charged were not in issue. Motion picture licensing generally had been held valid by the Supreme Court, and indeed in *Freedman* v. *Maryland* (380 U. S. 51), the case upon which the *Trans-Lux* order was reversed, the Supreme Court went out of its way to observe that a requirement of prior submission of motion pictures to a licensing board need not be unconstitutional. The *Freedman* case nullified the Maryland statute only because its procedural "apparatus" violated due process in not providing for prompt judicial review. Since the New York procedure was similar to Maryland's, this court on remand declared the New York statute null (16 N Y 2d 710, *supra*).

A majority at the Appellate Division sustained claimant's right to recover all fees paid since 1959. While $128,322.50 plus interest is now involved, other cases pending bring the claims to just under $2,000,000.

As posed by the parties, the issue is whether the payments of the license fees were voluntary, or involuntary under duress entitling the payor to recover, albeit the payments were made without protest or other action to resist the payments or to recover them.

Exhibit A

Two leading New York cases mark clearly when there is a right to recover unprotested taxes or fees.

In *Mercury Mach. Importing Corp.* v. *City of New York* (3 N Y 2d 418) this court, over vigorous dissent it is true, held that corporate taxpayers who voluntarily paid an illegally levied tax without protest were not entitled to refunds although the statute under which the taxes were paid was subsequently held unconstitutional. The fulcrum of the determination was the relatively new section of the Civil Practice Act which provided that a mistake being one of law for that reason alone did not forbid recovery for mistake (§ 112-f). The taxpayers had made a mistake of law, namely, as to the validity of the taxing statute, but it was held that the mistake did not render the payment involuntary. It was pointed out that in a sense no tax is paid willingly, free from the coercion of law. The precedents were collated and classified and it is unnecessary to repeat what was done there.

In *Five Boro Elec. Contrs. Assn.* v *City of New York,* (12 N Y 2d 146) this court again in an opinion by Judge Van Voorhis, who had written for the court in the *Mercury* case (3 N Y 2d 418, *supra*), but this time with unanimous concurrence of the court, permitted the recovery of license fees paid under a city local law without protest by licensed electricians. The distinction is made that the payments then in question were involuntary and under duress, because the electricians would otherwise have been barred from engaging in their occupations. The court held that protest was not required "under the circumstances of this case * * * in view of the compulsory nature of the payment of these exorbitant license fees" (*i.d.,* at p. 149). Most important, the fees themselves had been the subject of a previous successful attack and the exaction declared unconstitutional because the amounts bore no rea-

sonable relation to the licensing and regulation of electricians under a non revenue statute (*Adlerstein* v. *City of New York*, 6 N Y 2d 740).* Again the same authorities cited in the *Mercury* case were reviewed and the distinctions there made repeated to explain the difference in result between the two cases.

The *Mercury* and *Five Boro* cases are not aberrational. They conform generally with distinctions made throughout the country between voluntary payments of taxes or fees later declared void, and the necessity for protest in the case of voluntary payments (see, generally, Restatement, Restitution, § 75, incl. Comments and Illustrations; Ann., Taxes—Involuntary Payment—Recovery, 80 ALR 2d 1040; 53 C. J. S., Licenses, § 57).

Applying the distinctions to this case, the payments by claimants were voluntary, and in the absence of protest at the time, claimant is not entitled to recover the fees it paid just because in a collateral matter on grounds not applicable to it or ever raised by it, the statute has been declared null.

The test of voluntariness in cases involving taxes and fees is sometimes elusive and difficult of application. As noted earlier by Judge Van Voorhis, all taxes and fees in a sense are paid "involuntarily". The difference is often, if not always, one of degree and turns on many factors, including the right of taxing authorities to rely on objection, if there be resistance to payment, the likelihood that authentic resistance will be asserted, the un-

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* Plaintiffs in the *Five Boro* case were among those who brought the class action in the *Adlerstein* case to nullify the local law. The fees sought to be recovered in the *Five Boro* case were paid while the *Adlerstein* action was pending.

avoidable drastic impact of the taxes or fees on the claimant, and the impact on the public fisc, if revenues raised long ago and expended are subject to reimbursement. Surely one would expect motion picture distributors, and especially a corporation as large as claimant with its staff of lawyers, to protest if the fees were thought illegal. Indeed, the failure to protest indicates that there was no authentic resistance to making the minimal payments for the extensive procedures in licensing motion pictures whose gross yield would be massive compared to the trivial fees imposed.

Moreover, the fees as such have never been held illegal or excessive but on the contrary sustained, and the regulatory services which the fees financed have long ago been rendered and the cost undoubtedly passed on to the patrons of the films. The *Trans-Lux case* (14 N Y 2d 88, 380 U. S. 259, 16 N Y 2d 710, *supra*) and the *Freedman* case (380 U. S. 51, *supra*) each involved denial of a license for a motion picture and the denials were overturned because of the invalid procedure under the statute. On the other hand, the fees sought to be recovered in this case were reasonable tariffs for motion picture licensing and the films were actually licensed (*Matter of Connection Co.* v. *Regents,* 17 A D 2d 671, affd. 12 N Y 2d 779). Notably, in the *Freedman* case (380 U. S. 51, *supra*) the Supreme Court reiterated its prior holdings that motion pictures were properly subject to licensing and the payment of license fees. Indeed, Mr. Justice BRENNAN, on behalf of the court, suggested illustrative procedural means to implement a valid licensing statute (380 U. S., at pp. 60-61). In a similar context, and in the only reported case found deciding the issue of the recovery of license fees paid without protest under a motion picture licensing statute, the Pennsylvania Supreme Court denied

recovery for reasons analogous to those mentioned above (*Universal Film Exch.* v. *Board of Finance Revenue*, 409 Pa. 180, cert. den. 372 U. S. 958). Of particular significance to the Pennsylvania court were the long years of acquiescence with adequate opportunity to take legal action, the rendering of inspection services as a *quid pro quo*, the benefit to the industry, and the passing on of the costs of the license fees to the theatre-going public. (See, also, *Box Office Pictures* v. *Board of Finance & Revenue*, 402 Pa. 511, 515-519; *Paramount Film Distributing Corp* v. *Tracy*, 176 N. E. 2d 610, 618-621, affd. 118 Ohio App. Div. 29, affd. 175 Ohio St. 55.)

What has been said so far assumes, as the parties have assumed, that restitution is appropriate unless it can be shown that claimant paid its license fees voluntarily. But, if general principles of restitution were to be reached, even if one assumes involuntary or coerced payment, those principles do not support restitution.

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Grombach Prods.* v. *Waring*, 293 N. Y. 609, 615; *American Sur. Co.* v. *Conner*, 251 N. Y. 1, 8-11; *Miller* v. *Schloss*, 218 N. Y. 400, 407; *Schauk* v. *Schuchman*, 212 N. Y. 352; Restatement, Restitution, § 1; 50 N. Y. Jur., Restitution, §§ 1, 3). Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (50 N. Y. Jur. Restitution, § 7). Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact, or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (Restatement, Restitution, §§ 1, 142, esp. Comment *b*; *id.* § 155, incl. Comment *b*).

It is difficult to say that the State has received any benefit let alone unjust enrichment. The fees defrayed the cost of the licensing program, a program which, at least, was intended to further the interests of both the industry and the public. The statute was not a revenue measure, and, *inter alia*, it exacted a regulatory fee to support the program. The difference between regulatory fees and revenue imposts, the latter including unauthorized excessive regulatory fees paid involuntarily, also distinguishes this case from the *Five Boro* case (12 N Y 2d 146, *supra*).

Moreover, the funds have been disbursed long ago. Nor has the State acted tortiously or fraudulently in exacting the fees. The implications of this court's holding in *Trans-Lux* invalidating the statute for reasons distinct from the power to collect fees has already been noted. That the exactions were themselves proper and not tortious, fraudulent, or illegal, and that they have been consumed is significant. Generally, if a plaintiff's recovery will lead to an undue net loss to a defendant by reason of a changed position, as will often be the case when the funds have been disbursed, then the parties being equally innocent, recovery may be denied (*Ball* v. *Shepard*, 202 N. Y. 247, 253-254; *Matter of Herned*, 149 Misc. 476, 478-479 [Wingate, S.]; 44 N. Y. Jur., Payment, §§ 105-106; see, generally, Ann., Restitution—Payee's Change of Position, 40 ALR 2d 997).

In summary, the payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes; hence, no recovery for the fees collected without protest or other resistance may be allowed. Since a small percentage of fees were paid under protest between March and June, 1965, the matter should

be remanded so that such fees may be computed, and recovery allowed.

Accordingly, the order of the Appellate Division should be reversed, with one bill of costs, and the action remanded for further proceedings in accordance with this opinion.

Bergan, J. (dissenting). On March 15, 1965 the Supreme Court in *Matter of Trans-Lux Distr. Corp.* v. *Board of Regents* (380 U. S. 259) summarily, and on the authority of *Freedman* v. *Maryland* (380 U. S. 51) decided two weeks earlier, reversed the decision of this court in *Matter of Trans-Lux Distr. Corp.* v. *Board of Regents* (14 N Y 2d 88) which had sustained refusal by the Board of Regents to license a motion picture, and had again upheld the validity of the New York licensing statute (Education Law, tit. I, art. 3, part II).

Trans-Lux applied to this court in June, 1965 to amend the remittitur entered under the decision at 14 N Y 2d 88 to conform the judgment to the Supreme Court mandate and this motion was granted June 10 (16 N Y 2d 710). Specifically, the court directed that "the matter be remitted to the Supreme Court, Albany County, with directions to vacate its judgment entered April 24, 1964, and to enter a new judgment declaring and determining that Part II of article 3 of Title I of the Education Law violates the Fourteenth Amendment of the Constitution of the United States and is null and void" (16 N Y 2d, at p. 711).

In opposition to that motion the Board of Regents argued the general provisions of the statute survived the Supreme Court's decision and that the court did not "hold that the statute of the State of New York is un-

constitutional". This was an argument that the licensing and collection of the licensing fees could continue although the Regents must change its procedures.

This court's answer, as it has been observed, was a determination that the entire statute "is null and void", a decision embracing the fee provisions. This much must be said about the belief of the majority that the fees as such have never been held illegal.

It is not disputed claimant paid the State $128,322.50 in fees during the six-year period before June 10, 1965, either for licenses issued to it or to its parent corporation Paramount Pictures Corporation. The Court of Claims found claimant was entitled to $29,279 which was the amount claimant had paid in fees for licenses issued directly to it, but that it was not entitled to $99,025 which claimant itself had also paid as fees for licenses issued to its parent Paramount Pictures. The Appellate Division, by a divided court, modified this judgment to allow claimant the full amount of its claim, $128,322.50.

On the State's argument that a large part of the fees paid by claimant were not under protest, and, therefore, not recoverable because voluntarily paid, it is necessary to examine the two leading cases in this court in their impact on this problem and on each other.

In 1957 the court decided *Mercury Mach. Importing Corp.* v. *City of New York* (3 N Y 2d 418). This case involved actions to recover payments made by taxpayers on interstate business levied under the New York City General Business and Financial Tax Law. The tax in its effect on interstate commerce had been previously held invalid.

Since there had been no protest made, and the conditions of duress did not exist under which protest was

deemed unnecessary, i.e., "duress, where present liberty of person or immediate possession of needful goods is threatened by nonpayment" of the tax or where there was a resulting lien, the tax was held not under duress, and since not protested, could not be recovered (3 N Y 2d, at p. 425).

Five years later in 1962 the court decided *Five Boro Elec. Contrs. Assn.* v. *City of New York* (12 N Y 2d 146). It held that license fees paid by a number of electricians over a five-year period under a statute which had been held by this court invalid because excessive in amount and bearing no relation to the cost of licensing, could be recovered although paid by plaintiffs without protest.

To reach this result it became necessary for the court to distinguish *Mercury* (3 N Y 2d 418, *supra*) which it undertook to do. The ground of distinction was precisely laid down. No protest was needed, and there was, in effect, a resulting duress because "these electricians were placed in a situation where their only alternative was to submit to an illegal exaction or discontinue their businesses (*Swift Co.* v. *United States*, 111 U. S. 22, 28). They were not allowed to operate without licenses, nor could their licenses be renewed except by payment of excessive fees" (12 N Y 2d, at p. 149).

The court excused failure to protest the payment of fees even as to those made after there had been a judicial determination that the statute as applied was invalid. That decision, *Adlerstein* v. *City of New York* (11 Misc 2d 754, affd. 7 A D 2d 717, affd. 6 N Y 2d 740), was rendered at Special Term in April, 1958, and the fees allowed to be recovered were paid from 1954 through 1959 (12 N Y 2d, p. 147).

The ground for this was that even after *Adlerstein* (*supra*) was decided "unless they [licensees] had paid the excessive fees required for their licenses to do business they would have been prevented from earning a livelihood while that litigation was pending. The right to earn one's living and to engage in business is fundamental and its protection is necessary to the interests of society" (12 N Y 2d, at pp. 149-150).

Therefore, the rule of *Mercury* (3 N Y 2d 418, *supra*) was held not to apply to an invalid license requirement which, if not obeyed, would result in the loss of a right to engage in business. That exception to *Mercury* is exactly the case of the present claimant. There is at least as much "authentic resistance" to the payment of the claimant's license fees as there was in *Fire Boro* (12 N Y 2d 146, *supra*) and the actual protest came earlier in relation to judicial declarations of invalidity addressed to the respective statutes.

What seems decisive in the majority's summation of the grounds for decision here is that claimant's "payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes". On this aspect of the case, at least, *Fire Boro* (12 N Y 2d 146, *supra*) appears to be indistinguishable and it should be overruled or followed. The need for protest, and not the uses to which the fees were put, was decisive in *Fire Boro*. The rule for licensed electricians and licensed motion picture exhibitors should be pretty much the same.

Thus the difference between regulatory fees and revenue imposts played no part in the announced reasons for decision in *Fire Boro* and is not a ground to distinguish the present case. This court did not in *Adlerstein* (6 N Y 2d 740, *supra*) hold the electricians' fees so high as to become

a revenue impost: and *Fire Boro* did not consider this ground, but treated the actions as brought to "recover excess money" (12 N Y 2d, at pp. 147-148) under the *Adlerstein* holding that the fees were unconstitutionally excessive.

That the State used the proceeds of the license fees collected under the statute in the licensing operation itself does not for the purposes of this case distinguish it from one where the fee or tax is used for general State purposes. Here the program of inspection and licensing expressed in the statute was responsive to the State's belief in the value of censorship to protect morals and elevate public taste, and so in furtherance of a general public policy. No benefit to the business of motion picture exhibitors was intended or demonstrated in the experience with censorship.

Hence the impact of the fee on the licensee's business was not for the protection or assistance of the licensee or even to improve its service to the public, but rather to effectuate the purpose of public authority to censor.

Long experience with this type of censorship left its benefit to the public doubtful, and where approval of films was not granted routinely, the censor tended to act repressively against creative innovation. Ultimately censorship ran afoul of constitutional freedom of expression.

It is true, as the majority has observed, that an action for recovery for unjust enrichment or restitution should appeal to equity and good conscience and this principle ought to apply to an action such as the present one.

Here the good conscience in issue is that of the sovereign which collected the fees under the compulsion of a statute which the sovereign State itself, by its highest

court, advisedly held to be "null and void". It seems the part of fair dealing to turn the money back.

The sum is large for the taxpayers as well as the State. As Judge FULD noted in dissent in *Mercury* (3 N Y 2d 418, *supra*): "Modern and enlightened tax administration frowns upon the imposition of technical obstacles to the refunding of illegally collected taxes" (p. 433).

The order should be affirmed.

Judges BURKE, SCILEPPI and JASEN concur with Judge BREITEL; Judge BERGAN dissents and votes to affirm in a separate opinion in which Chief Judge FULD and Judge GIBSON concur.

Order reversed, with costs, and case remitted to the Court of Claims for further proceedings in accordance with the opinion herein.

EXHIBIT B

(Order of the Court of Claims on Remand)

FILED
Feb 13 1973

State Court of Claims
Albany, N. Y.

At a Term of the Court of Claims of the State of New York held in its Courtroom at the Justice Building, South Mall, in the County of Albany and City of Albany in said State on the 13th day of February 1973.

Present:

HON. MILTON ALPERT,
Judge.

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant,

— against —

THE STATE OF NEW YORK,

Defendant.

Exhibit B

ORDER

CLAIM NO. 45976

MOTION NO. M-15178

On February 13, 1973, the following papers, numbered 1 to 2, were read on motion by Claimant for an Order directing the entry of final judgment.

	Papers Numbered
Notice of Motion and Affidavit Annexed	1
Opposing Affidavit	2

Upon the foregoing papers, this motion is GRANTED.

The Court of Appeals, in *Paramount Film Distributing Corporation* v. *The State of New York*, 30 N.Y.2d 415 at page 422 directed that: ". . . [s]ince a small percentage of fees were paid under protest between March and June, 1965, the matter should be remanded so that such fees may be computed, and recovery allowed."

The matter is before the undersigned pursuant to such direction. Both parties agree that the fees paid under protest and for which recovery may be had is the sum of $341.

A judgment in the amount of $1,501.25 representing the State's costs on appeal, as allowed, has already been entered. Accordingly, in accordance with the direction of the Court of Appeals and without adversely affecting such judgment for costs, the Clerk of the Court is directed to enter a final judgment in favor of the Claimant in the sum of $341 together with appropriate interest.

Enter.

/s/ MILTON ALPERT
J.C.C.

Dated: February 13, 1973,
Albany, New York.

EXHIBIT C

(Judgment or Remittitur of the Court of Appeals)

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of June in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur June 8, 1972

3. No. 23. 72

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Respondent,

vs.

THE STATE OF NEW YORK,

Appellant.

BE IT REMEMBERED, That on the 21st day of January in the year of our Lord one thousand nine hundred and

seventy-two, The State of New York, the appellant—in this cause, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Paramount Film Distributing Corporation, the respondent—in said cause, afterwards appeared in said Court of Appeals by E. Compton Timberlake, its attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mrs. Grace K. Banoff, of counsel for the appellant—, and by Mr. John R. Davison, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, and the case remitted to the Court of Claims for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Claims of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Claims of the State of New York, before the Judges thereof, according to the form of the statute in such case made

and provided, to be enforced according to law, and which record now remains in said Court of Claims, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, JUNE 8, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(SEAL)

EXHIBIT D

(Order of the Court of Appeals Denying Reargument and Granting Amendment of its Remittitur)

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of September, A.D. 1972.

Present,

HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 724

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Respondent,

vs.

STATE OF NEW YORK,

Appellant.

A motion for reargument and to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the respondent and papers having been submitted thereon and due deliberation having been thereupon had, it is

Exhibit D

ORDERED, that the said motion, insofar as it seeks re-argument, be and the same hereby is denied; and it is

ORDERED, that the said motion, insofar as it seeks amendment, be and the same hereby is granted. Return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the Due Process Clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 NY 2d 415).

AND the Court of Claims hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

EXHIBIT E

(Final Judgment of Court of Claims on Remittitur)

STATE OF NEW YORK

COURT OF CLAIMS

Claim No. 45970

Motion M-15178

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant-Respondent,

—against—

THE STATE OF NEW YORK,

Appellant.

The State of New York having appealed to the Court of Appeals from the order of the Appellate Division, Third Department, entered herein in the office of the Clerk thereof on August 2, 1971 and the Court of Appeals having reversed, with costs, said order appealed from and, by its remittitur dated June 8, 1972, remanded the matter to this Court to determine the amount of fees paid by Paramount Film Distributing Corporation under protest and directed the grant of judgment to said Claimant against the State of New York for that amount and Claimant-Respondent having moved for an order directing entry of such a judgment, papers having been submitted thereon John R. Davison, Esq., of counsel, appearing for claim-

ant, and Grace K. Banoff, Esq., Assistant Attorney General, appearing for defendant and not opposing, and the Court (Alpert, J.) having entered an order herein on February 13, 1973 determining, on agreement of the parties, that the amount of fees paid under protest totaled the sum of $341.00 and directing entry of judgment in favor of Claimant against the State in that amount without affecting the judgment for costs entered herein on June 16, 1972;

NOW, THEREFORE, it is

ORDERED AND ADJUDGED that Claimant, Paramount Film Distributing Corporation be and it hereby is awarded Three Hundred Forty-One ($341.00) Dollars, with interest thereon, at the rate of four percent per annum from June 10, 1965 to June 25, 1971, and interest thereon at the rate of six percent per annum from June 25, 1971 to and inclusive of March 13, 1973, the date of entry of judgment herein, to wit: the sum of One Hundred Seventeen and 59/100 ($117.59) Dollars, amounting in all to the sum of Four Hundred Fifty-Eight and 59/100 ($458.59) Dollars, and that the claim herein for refund of other fees be and the same hereby is dismissed.

DATED: Albany, New York
March 13, 1973

DAVID B. KLINGMAN
Deputy Chief Clerk of the
Court of Claims

EXHIBIT F

(Non-Final Judgment of Court of Claims Entered June 16, 1972)

STATE OF NEW YORK

COURT OF CLAIMS

Claim No. 45976

Motion M-10554

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant-Respondent,

—against—

THE STATE OF NEW YORK,

Appellant.

[The above-named appellant The State of New York, having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on August 2, 1971, and a Judgment of the Court of Claims entered in the Clerk's Office thereof on July 22, 1969, from which the Claimant-Respondent cross-appealed, in the sum of $37,751.71, inclusive of interest (Lengyel, J.); and said appeal having been argued by the Honorable Louis J. Lefkowitz, Attorney General, by Grace K. Banoff, Esq., of counsel for the Appellant, and by E. Compton Timberlake, Esq., attorney for claimant by John R. Davison, Esq., of counsel, and after due deliberation the Court of

Exhibit F

Appeals having handed down its decision on June 8, 1972, reversing the Order appealed from, with costs, and remitting the case to the Court of Claims for further proceedings in accordance with opinion by Breitel, J., all concurring except Bergan, J., who dissents and votes to affirm in an opinion in which Fuld, Ch. J., and Gibson, J., concur; and an Order having been entered in the Court of Appeals on June 8, 1972, in accordance with the said decision.]*

And the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on June 8, 1972, having been filed in the Clerk's Office of the Court of Claims on June 15, 1972, and the costs on appeal having been taxed by the Deputy Chief Clerk of the Court of Claims on June 16, 1972 in the sum of $1,501.25, it is

Ordered and Adjudged that the Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on August 2, 1971, modifying the judgment appealed from, on the law and the facts, so as to increase the award from $29,297 to $128,322.50 plus appropriate interest, and, as so modified, affirmed, and further ordering that the order appealed from by the State of New York vacating a subpoena *duces tecum* be, and the same is affirmed with one bill of costs; be and the same is reversed, with costs, and the case remitted to the Court of Claims for further proceedings in accordance with the opinion, and it is further

Ordered and Adjudged that The State of New York, above-named appellant, recover herein against Paramount Film Distributing Corporation the sum of One Thousand

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* Matter within brackets marked VACATED. Actually superseded by amended judgment.

Exhibit F

Five Hundred One and 25/100 ($1,501.25) Dollars, its costs on appeal.

Dated: Albany, New York
June 16, 1972

(Illegible)
Deputy Chief Clerk of the
Court of Claims

EXHIBIT G

(Non-Final Judgment of Court of Claims Entered October 27, 1972)

STATE OF NEW YORK

COURT OF CLAIMS

Claim No. 45976

Motion M-10554

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant-Respondent,

—against—

THE STATE OF NEW YORK,

Appellant.

The above-named appellant, The State of New York, having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on August 2, 1971, and a Judgment of the Court of Claims entered in the Clerk's Office thereof on July 22, 1969, from which the Claimant-Respondent cross-appealed, in the sum of $37,751.71, inclusive of interest (Lengyel, J.); and said appeal having been argued by the Honorable Louis J. Lefkowitz, Attorney General, by Grace K. Banoff, Esq., of counsel for the Appellant, and by E. Compton Timberlake, Esq., attorney for claimant by John R. Davison, Esq.,

of counsel, and after due deliberation the Court of Appeals having handed down its decision on June 8, 1972, reversing the Order appealed from, with costs, and remitting the case to the Court of Claims for further proceedings in accordance with opinion by Breitel, J., all concurring except Bergan, J., who dissents and votes to affirm in an opinion in which Fuld, Ch. J., and Gibson, J., concur; and an Order having been entered in the Court of Appeals on June 8, 1972, in accordance with the said decision,

And the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on June 8, 1972, having been filed in the Clerk's Office of the Court of Claims on June 15, 1972, and the costs on appeal having been taxed by the Deputy Chief Clerk of the Court of Claims on June 16, 1972 in the sum of $1,501.25,

And judgment in accordance having been entered in the office of the Clerk of the Court of Claims on June 16, 1972, modifying the judgment appealed from, on the law and the facts, so as to increase the award from $29,297 to $128,322.50 plus appropriate interest, and as so modified, affirmed; and further ordering that the order appealed from by the State of New York vacating a subpoena *duces tecum* be, and the same was affirmed with one bill of costs; and the same reversed, with costs, and the case was remitted to the Court of Claims for further proceedings in accordance with the opinion, and further ordering that the above-named appellant, recover against Paramount Film Distributing Corporation the sum of $1,501.25, its costs on appeal.

And thereafter a motion for reargument and to amend the remittitur having been submitted, this Court (Court

of Appeals) on September 28, 1972, having denied the motion as to reargument and granted the motion as to amendment of the remittitur, this remittitur is hereby amended by adding thereto the following:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the due process clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 N Y 2d 415)."

and, it is

ORDERED AND ADJUDGED that the judgment entered on June 16, 1972 in the office of the Clerk of the Court of Claims, be and the same hereby is amended to include the following:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the due process clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 N Y 2d 415)."

and it is further

ORDERED AND ADJUDGED that in all other respects the judgment entered in the Court of Claims on June 16, 1972 be and the same is hereby affirmed.

Dated: Albany, New York
October 27, 1972

DAVID B. KLINGAMAN
Deputy Chief Clerk of the
Court of Claims